Ho Fok v Ann Bee (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D5–29–5030 OF 1999
KANG HWEE GEE J
15 JANUARY 2002

Bankruptcy *— Creditor's petition — Presentation of — Whether person presenting petition must be duly authorized to do so — Whether it must be stated in petition and affidavit verifying petition that person was so authorized — Bankruptcy Rules 1967 r 215 — Bankruptcy Act 1967 s 133*

An adjudication order and a receiving order were made against the judgment debtor ('JD') obtained by the judgment creditor ('JC') from the Shah Alam High Court. The JD appealed against the decision, opposing the petition on the ground that Mr Lee Neh @ Lee Pins Ten (the director of the JC), who presented the petition for the JC, had failed to state in the petition and in his affidavit verifying the petition that he was authorized under the seal of the JC to present the petition and that both the petition and the affidavit had offended r 215 of the Bankruptcy Rules 1967 ('the Rules') and s 133 of the Bankruptcy Act 1967 ('the Act') and had rendered the petition void and ineffective, or should be dismissed. Counsel for the JD stated that r 215 of the Rules had to be read with s 133 of the Act and it was clear that any officer presenting the petition had to be duly authorized under the seal.

Held, dismissing the appeal with costs:

(1) The petition was signed by a director of the JC, Mr Lee Neh @ Lee Pins Ten. It therefore fell squarely within that limb of r 215 that allowed a petition to be 'presented by the corporation, and signed by the officer on its behalf'. It did not therefore require the person to state that he had been authorized under seal (see p 335F); *Re Kang Chong Yeow* [2001] 3 MLJ 98 followed; and *Re Lim Chooi Sang, ex p Soon Fay Sdn Bhd* [1999] 5 MLJ 605 not followed.

(2) A company could only act by delegating its power to its directors. Generally, the scope of that delegated power was defined under its articles of association which would invariably have to include the power provided in Table A of the Fourth Schedule to 'exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting'. If a petition was signed by a director of a company, it must be accepted as a matter of course that it was presented by the company under such a delegated power. There was hardly any ground to question the legality of its presentation. The petition had been as immaculately conceived as it could possibly have been (see p 336G–I).

(3) There was hardly any justification to read r 215 of the Rules in conjunction with s 133(a) of the Act and to find therefrom that in

all the three instances of presenting a petition of a corporation under r 215, the officer must be authorized under the seal of the corporation, and that a failure to state so in the petition rendered the petition void and ineffective (see p 337A).

[Bahasa Malaysia summary

Satu perintah penghukuman dan satu perintah penerimaan telah dibuat terhadap penghutang penghakiman ('JD') yang diperolehi oleh pemiutang penghakiman ('JC') daripada Mahkamah Tinggi Shah Alam. JD telah membuat rayuan terhadap keputusan tersebut, membangkang petisyen tersebut atas alasan bahawa En Lee Neh @ Lee Pins Ten (pengarah JC), yang telah mengemukakan petisyen tersebut kepada JD, telah gagal untuk menyatakan dalam petisyen tersebut dan dalam afidavit beliau mengesahkan petisyen tersebut bahawa beliau telah diberi kuasa di bawah meterai JC untuk mengemukakan petisyen tersebut dan bahawa kedua-dua petisyen tersebut dan afidavit tersebut adalah bercanggah dengan k 215 Kaedah-Kaedah Kebankrapan 1967 ('Kaedah tersebut') dan s 133 Akta Kebankrapan 1967 ('Akta tersebut') dan telah menyebabkan petisyen tersebut batal dan tidak berkuatkuasa, atau sepatutnya ditolak. Peguam untuk JD menyatakan bahawa k 215 Kaedah tersebut perlu dibaca dengan s 133 Akta tersebut dan adalah jelas bahawa mana-mana pegawai yang mengemukakan petisyen mesti diberi kuasa di bawah meterai tersebut.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Petisyen tersebut telah ditandatangani oleh seorang pengarah JC, En Lee Neh @ Lee Pins Ten. Oleh demikian ia jatuh di bawah ruang lingkup cabang k 215 yang membenarkan satu petisyen 'dikemukakan oleh koperasi, dan ditandatangani oleh pegawai bagi pihaknya'. Oleh itu ia tidak menghendaki seseorang itu menyatakan bahawa beliau diberi kuasa di bawah meterai (lihat ms 335F); *Re Kang Chong Yeow* [2001] 3 MLJ 98 diikut; dan *Re Lim Chooi Sang; ex p Soon Fay Sdn Bhd* [1999] 5 MLJ 605 tidak diikut.

(2) Sebuah syarikat hanya boleh bertindak melalui perwakilan kuasa kepada pengarah-pengarahnya. Secara am, skop perwakilan kuasa yang diberikan telah ditakrifkan dalam perkara-perkara persatuannya yang selalunya termasuklah kuasa yang diperuntukkan dalam Table A kepada Jadual Keempat untuk 'exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting'. Jika satu petisyen telah ditandatangani oleh pengarah syarikat, ia patut diterima sebagai satu kelaziman bahawa ia telah dikemukakan oleh syarikat tersebut di bawah perwakilan kuasa demikian. Tiada langsung apa-apa alasan

untuk mempersoalkan kesahihan pengemukaannya. Petisyen tersebut dilihat sebagai telah dimulakan dengan sempurna (lihat ms 336G–I).

(3) Tiada langsung justifikasi untuk membaca k 215 Kaedah tersebut bersama s 133(a) Akta tersebut dan untuk mendapati daripada situ dalam semua tiga jenis pengemukaan petisyen bagi sebuah perbadanan di bawah k 215, pegawai tersebut mesti diberikan kuasa di bawah meterai perbadanan itu, dan kegagalan untuk menyatakan demikian dalam petisyen akan menyebabkan petisyen tersebut batal dan tidak berkuat kuasa (lihat ms 337A).]

Notes

For cases on creditor's petition generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1626–1635.

Cases referred to

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 20 (refd)

Kang Chong Yeow, Re [2001] 3 MLJ 98 (folld)

Lim Chooi Sang, Re; ex p Soon Fay Sdn Bhd [1999] 5 MLJ 605 (not folld)

Mat Shah bin Safuan, Re; ex p United Asian Bank Bhd [1991] 2 MLJ 48 (refd)

Pender v Lushington (1877) 1 Ch D 70 (refd)

Samuel Pakianathan a/l Jabamanickam; ex p Perwira Habib Bank (M) Bhd [1997] MLJ 737 (refd)

Yong Tet Yin, Re; ex p United Overseas Bank Ltd [1995] 4 MLJ 582 (refd)

Legislation referred to

Bankruptcy Act 1967 s 133(a)
Bankruptcy Rules 1967 r 215

SM Kam (*SM Kam & Associates*) for the appellant/judgment creditor.
KK Lee (*YM Chin & Lee*) for the responden/judgment debtor.

Kang Hwee Gee J: Following a hearing before the senior assistant registrar on 30 July 2001, an adjudication order and a receiving order were made against the judgment debtor ('the JD') based on the judgment debt of RM463,291.41 obtained by the judgment creditor ('the JC') from the Shah Alam High Court on 3 September 1999.

The JD now appeals against the said decision.

The bankruptcy petition was presented for the JC by its director Mr Lee Neh @ Lee Pins Ten.

The JD opposed the petition on the ground that the said Mr Lee had failed to state in his petition and also in the affidavit verifying the petition, that he was authorized under the seal of the JC to present the petition. Both the petition and the affidavit it was contended, had offended r 215 of the Bankruptcy Rules 1967 ('the Rules') read with s 133 of the Bankruptcy Act 1967 ('the Act'), and had thereby rendered the petition void and ineffective. Consequently, it was argued, the petition should have been dismissed.

Section 133(a) of the Act reads as follows:

> For all or any of the purposes of this Act —
>
> (a) a corporation may act by any of its officers in that behalf under the seal of the corporation.

Rule 215 of the Rules read as follows:

> Where a corporation presents a petition or takes any other action under this Act, the officer of the corporation may act in his own name, stating that he is such officer duly authorized under seal; but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an 'officer' within s 133, and if duly authorized under seal can act for the corporation.

Counsel for the JD relied on the judgment of Steve Shim J (as he then was) in *Re Lim Chooi Sang; ex p Soon Fay Sdn Bhd* [1999] 5 MLJ 605 at p 609 in which he had ruled as follows:

> In any event, I am more inclined to accept the construction adopted by the court in *Re Samuel Pakianathan*. In my view, r 215 has to be read with s 133 of the Bankruptcy Act. Reading the second limb in r 215 with s 133, it would seem clear that any officer presenting a creditor's petition on behalf of a corporation has to be duly authorized under seal. In the case of a corporation presenting a creditor's petition by an officer authorized in that behalf, there is no necessity for a board resolution granting the authorization to be under seal provided that the seal of the corporation is affixed to the authorization: See *Re Midgley* (1913) 68 LT 45.
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> Having regard to the views I take, I am bound to hold that the JC has not shown that En Chong Che Chong (a director of the JC) who presented the creditor's petition on behalf of the JC, a corporation, had been duly authorized under seal to do so at the material time. Neither the creditor's petition nor the affidavit of truth of statement deposed by Encik Chong Che Chong give any indication that there was an authorization under seal. In the circumstances, and for the reasons stated, I find there is substance in the first ground advanced by the JD.

His Lordship followed the reasoning of Kamalanathan Ratnam JC (as he then was) in the earlier case of *Samuel Pakianathan a/l Jabamanickam; ex p Perwira Habib Bank (M) Bhd* [1997] MLJ 737, wherein an 'officer duly authorized' in r 215 was read in conjunction with s 133(a) of the Act to mean 'one who has been authorized under the seal of the corporation', and consequently, it was held that the officer presenting the petition of the company must still have to be one who has been authorized under the seal of the corporation.

A The decision appears to be at variance with the judgment of Abdul Wahab Patail J in *Re Kang Chong Yeow* [2001] 3 MLJ 98 wherein he had commendably analyzed r 215 of the Rules. He found that there were three ways by which a corporation may go about to present a bankruptcy petition under that rule. The JC's company in that case, it was held, was perfectly entitled to present the petition by its executive director notwithstanding that B he may not have been authorized under seal. This was what he said at p 112 of the judgment:

> It is clear from the first part of r 215 that where a company presents a petition or takes any other action under this Act, it may do so firstly by an officer of the corporation acting in his own name, in which case he has to state that he C is such officer duly authorized under seal; and secondly a petition may also be presented by the corporation and signed by an officer of the corporation on its behalf. The next part of the rule applies to a third method of presenting a petition, that is by an agent, who is not an officer of the corporation in the ordinary course, but is deemed to be an officer for the purpose of presenting a petition; and since such agent is an independent entity outside the corporation, he would need to be duly authorized under seal before he can D present a petition for the corporation.
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> The proceeding in this case, however, is clearly undertaken under the second alternative, that is by the company Mivan Far East Sdn Bhd. The affidavits deposed by James Martin Laughlin states clearly that he is the executive director of the judgment creditor (respondent) and that he has been authorized to make the affidavit on behalf of the respondent. Nothing in this E proceeding shows that it is being undertaken by James Martin Laughlin himself on behalf of Mivan Far East Sdn Bhd. In the circumstances, the objection under r 215 is unsustainable on the facts ...

I am, with respect, inclined to agree with the decision of Abdul Wahab Patail J in *Re Kang Chong Yeow*.

F As in *Re Kang Chow Yeow*, the petition in the instant case was signed by a director of the JC, Mr Lee Neh @ Lee Pins Ten. It therefore falls squarely within that limb of r 215 that allows a petition to be 'presented by the corporation, and signed by the officer on its behalf'. It does not therefore require the person to state that he had been authorized under seal.

G The view that a corporation may act by itself through its officers under the second limb of r 215 without having to be authorized under seal is shared by two other High Court decisions.

Hence in *Re Yong Tet Yin; ex p United Overseas Bank Ltd* [1995] 4 MLJ 582, a bankruptcy petition presented by a person acting purely as 'the H manager and attorney' of the JC, United Overseas Bank Ltd, was held to be perfectly valid. The court considered both the provisions of r 215 of the Rules and s 133 of the Act but did not consider it necessary to attach any significance to the words 'authorized on that behalf under the seal of the corporation' in s 133 of the Act. Tee Ah Sing JC, as he then was, held (correctly, in my view) that:

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> From the petition it is clear that it is presented by the judgment creditor, a corporate body, and signed by Wong Chee Kiong, the manager and attorney of the judgment creditor. Thus the petition is presented under the second limb

> of s 215 of the Rules. The creditor's petition was filed in compliance with r 99 of the Rules and the form No 9.

The decision in *Re Yong Tet Yin* seems to ride in tandem with another rational High Court decision, ie that of Siti Norma Yaakob J (as she then was) in *Re Mat Shah bin Safuan; ex p United Asian Bank Bhd* [1991] 2 MLJ 48 where both r 215 of the Rules and s 133(a) of the Act were considered. The petition was presented by an attorney and manager of the JC, and as in *Re Yong Tet Yin*, the words 'authorized on that behalf under the seal of the corporation' was not read into r 215. Her Ladyship said at pp 49–50 of her judgment:

> From the petition in these proceedings, it is clear that it is presented by the judgment creditor, a corporate body and signed by S Sinnappan, the manager and attorney of the judgment creditor (a bank). Thus the petition is presented under the second limb of rule 215. The power of attorney dated 23 May 1973 gives wide powers to S Sinnappan to act on behalf of the judgment creditor and under cl 8 (d) it expressly states that he can act singly on behalf of the judgment creditor in all matters arising out of the bankruptcy of any person indebted to the bank. By virtue of his official position alone, he has every authority to present a petition on behalf of the judgment creditor and there is no question that he needs the authority to use the seal of the judgment creditor or that there must be a board resolution passed authorizing him to use the seal. This is only relevant where the corporation chooses an agent, who is not a bank officer, to act on its behalf and under those circumstances the agent is referred to as 'an officer' within the meaning of s 133(a) of the Act.

More however, needs to be said of the function and power of the director of the company to provide the rationale for that aspect of the rule.

As the learned authors of *Chan & Koh's Company Law* wrote at 6.101 of their work:

> A company being a fictitious persona 'cannot act in its own person, for it has no person'. Any proposition about a company necessarily involves a reference to a set of rules by which acts are attributed to the company. This set of rules has been described as the 'rules of attribution' which are said to contain the 'primary rules of attribution' and 'general rules of attribution'. A company being a persona ficta may only act through the agency of natural persons.

Being an artificial person therefore, a company can only act by delegating its power to its directors. Generally, the scope of that delegated power is defined under its articles of association which would invariably have to include the power provided in Table A of 4th Sch to 'exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting'.

It follows therefore, that if a petition is signed by a director of a company as in the instant case, it must be accepted as a matter of course that it is presented by the company under such a delegated power. There is hardly any ground to question the legality of its presentation. The petition has been as immaculately conceived as it could possibly have been.

A In my considered view, there is hardly any justification to read r 215 of the Rules in conjunction with s 133(a) of the Act and to find therefrom that in all the three instances of presenting a petition of a corporation under r 215, the officer must be authorized under the seal of the corporation, and that a failure to state so in the petition renders the petition void and ineffective.

B Section 133(a) of the Act merely says that for the purpose of the Act, a corporation may act by any of its officers authorized under the seal of the corporation so to act. It does not say that the corporation must, at all costs and in all cases, act only by its officer who must be authorized under the seal of the corporation. The section is therefore purely directory and not C mandatory in nature.

It would be ideal if a corporation decides to act in harmony with the requirement. But the fact that the authority to act was not given to him under the seal of the corporation does not ipso facto mean that the officer does not have the authority to act for the corporation and that the petition D should be dismissed forthwith.

The purpose of Rule 215 of the Rules and s 133(a) of the Act is merely to prescribe a format within which a corporation should go about in presenting a bankruptcy petition, thereby providing in the process some form of orderliness and certainty — as where for instance an officer can E positively assert in the petition itself that he had been authorized under the seal of the corporation to present the petition. There could be little in the way of his standing that can be questioned — for has he not with him the very seal of the corporation?

But that does not necessarily mean that the petition should be rejected by the court merely because the officer did not follow this procedure if he F could show by other convincing means that he has indeed been authorized to act for the corporation, such as by a resolution of the board of directors, as the petitioner did in the instant case.

There is a common law presumption that every official act is presumed to have been regularly performed. Where therefore, on the face of it, a G petition indicates that it is being presented by an officer of the corporation, a party questioning the legality of its issuance must first show by some credible evidence that he has reason to believe that it has not been issued with the authority of the corporation. It is insufficient merely for him to point to some perceived irregularities in the petition and apply for the petition to be dismissed.

H Whereas when a pleading is challenged on valid ground with respect to the authority of the issuer to act for a company, the court has always resolved it by staying the proceeding in order to allow the company to determine positively whether he has been authorized to commence the proceeding and where appropriate, to ratify or rectify any defects that may I arise (see *Pender v Lushington* (1877) 1 Ch D 70; *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209. The same practice should apply to any petition, including a bankruptcy petition.

The JD in this case is not therefore at liberty to raise what he had perceived as an irregularity on the face of the petition as a ground to dismiss the petition. A

The appeal is dismissed with costs.

Appeal dismissed with costs.

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Reported by Chew Phye Aun

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